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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE FACEBOOK, INC. and MARK ZUCKERBERG, Plaintiffs, v. CONNECTU, INC. (formerly known as CONNECTU, LLC), CAMERON WINKLEVOSS, TYLER WINKLEVOSS, DIVYA NARENDRA, PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, WAYNE CHANG, and DAVID GUCWA, Defendants.	Case No. 5:07-CV-01389-RS **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** Date: October 10, 2007 Time: 9:30 A.M. Judge: Honorable Richard Seeborg

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I. INTRODUCTION

Defendants' Motion to Dismiss must be denied. Exercising personal jurisdiction over the Winklevoss brothers and Narendra is proper. Direct estoppel and issue preclusion do not apply in this case because:

1. The current complaint adds new parties, new claims, and new jurisdictional allegations based on previously unknown discovery. These changes support the exercise of personal jurisdiction over Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra.
2. To escape jurisdiction earlier in this case, the Winklevoss brothers and Narendra previously proffered false testimony rendering application of direct estoppel and/or issue preclusion improper.
3. Subsequent court holdings, which are res judicata and issue preclusive eliminate any direct estoppel and/or issue preclusion.

Without any new argument, Defendants also incorporate by reference the Motion to Quash that they filed in Superior Court. *See* Defs. Mot. to Dismiss at 8:4-6 (Doc. No. 136). In addition to being based on the false premise that Defendants were members of ConnectU, that motion does not address any of the new evidence concerning the Defendants' use of Importer and Social Butterfly that led this Court recently to deny the Motion to Dismiss brought by Pacific Northwest Software and Winston Williams. The new allegations of Defendants' involvement in the downloading without authority of proprietary information from the Facebook website, in addition to their spamming activities, provide an independent basis to assert personal jurisdiction.

II. FACTS

A. The Allegations From The Original Complaint And The Evidence Before the Superior Court Proceedings Were Incomplete

Facebook, Inc. originally filed this action on August 17, 2005, in Santa Clara County Superior Court naming as defendants Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra ("Defendants"), Howard Winklevoss and ConnectU, LLC. Decl. of Theresa Sutton in Supp. of Opp'n to Mot. to Dismiss ("Sutton Decl."), Ex. B. That original complaint asserted only two claims for relief for violation of California Penal Code Section 502(c) and common law misappropriation. *Id.* Facebook alleged, *inter alia*, that ConnectU and Defendants gained unlawful access to Facebook's website and downloaded user data such as email addresses. *See* *id.* ¶¶ 19-20.

Although ConnectU conceded jurisdiction, Defendants and Howard Winklevoss filed a joint Motion to Quash Service of Summons and Complaint for Lack of Personal Jurisdiction. Mosko Decl. (Doc. No. 137), Exs.V-2, V-3. In their motion, Defendants argued they were not subject to jurisdiction in California because they only acted in their capacity as "members" of ConnectU, LLC when they downloaded materials from the Facebook website. *Id.* & Ex. V-8. During expedited discovery, Defendants repeatedly testified they were members in court-compelled discovery responses, including to form interrogatories, special interrogatories, document requests, and requests for admissions. Sutton Decl., Exs. R, T, V; *see also* Facebook's Mot. for Sanctions (Doc. No. 126). In their Reply brief they also argued, for the first time, that they engaged in no unauthorized acts after July 2004, a date they claimed was before Facebook operated in California. Sutton Decl., Ex. C at 1-2. On June 2, 2006, the Superior Court granted the Motion to Quash, without explanation. Mosko Decl., Ex. 1 at 2.

1. Defendants Were Not Members Of ConnectU During The Relevant Times

Ten days after they were dismissed from this action, all three Defendants changed their testimony and ***denied*** in the Massachusetts action that Narendra was a member of ConnectU, LLC prior to August 5, 2005. Sutton Decl., Exs. W, X, D at 14 ("The Winklevoss brothers did echo Narendra: they said Narendra was not a Member at formation."). Because his inclusion as a member of ConnectU, LLC would destroy diversity jurisdiction, Defendants repeatedly argued that Divya Narendra was not a member of ConnectU, LLC on September 2, 2004, and suggested that all statements to the contrary made in this action were wrong. *Id.* Ultimately, after a two day evidentiary hearing to assess credibility, the Massachusetts Court held that ***none*** of the Defendants was a member between April 6, 2004, and August 5, 2005. *See ConnectU v. Zuckerberg*, 482 F. Supp. 2d 3, 26-27 (D. Mass. 2007).

During the course of the evidentiary hearings, Narendra freely admitted that he would be willing to offer inconsistent testimony in both California and Massachusetts in order to avoid being made subject to personal jurisdiction in California:

> Q: Mr. Narendra, if Mr. Chatterjee's client, TheFacebook, went back to California tomorrow and sued you again personally for accessing TheFacebook website in July of 2004, you'd go right back to the California court and tell them again that when you did that you were acting in your capacity as a member of ConnectU, LLC, wouldn't you?
>
> A. Yes.

Sutton Decl., Ex. A at 76:2-8. Later, though, Narendra continued to argue in Massachusetts that "I was not a member September 2, 2004 when – or on September 2, 2004 I was not a member." *Id.* Exs. A at 77:2-3; X at 7. It is this willingness by Defendants to say "whatever will keep them out of California" that infuses their latest Motion to Dismiss as well.

2. Defendants' Activities Were Felt In California

Defendants argued in their Reply to Facebook's Opposition to their Motion to Quash that they engaged in no acts after July 2004, based on an assertion that they had not downloaded emails "manually" from the Facebook website after that date.[1] *Id.*, Ex. C at 4. Contrary to their proffered testimony, Defendants' "manual" downloading of information and spamming continued after July 2004 – a fact Defendants did not share with the Court and hid from discovery. *Id.*, Ex. E at C007512.[2] In addition, more recent evidence shows that Defendants were intimately involved throughout 2005 in developing and exploiting the software programs "importer" and "Social Butterfly." *Id.*, Exs. L, P. These programs were specifically designed to automatically attack the Facebook website, obtain email account information, and then "spam" Facebook users with invitations to join ConnectU. SAC ¶¶ 26-34; Sutton Decl., Exs. E, L, M, N, P.[3] None of these facts was before the Superior Court when it dismissed Defendants on June 2, 2006. Those facts also were not known to Facebook at that time. Notably Defendants do not challenge the new allegations set forth in the SAC, which identify Defendants' role in these activities for purposes of personal jurisdiction. See *id.*

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[1] This date is significant because it is undisputed that Facebook was in California after July 2004. Mosko Decl., Ex. V-8-F (Doc. No. 137-21) at FACE002227.

[2] Exhibit E is a compilation of various documents produced by ConnectU. Because the jurisdictional discovery cites are extensive and many concern confidential information, Facebook has compiled multiple documents from individual productions as the Exhibits attached to the Declaration of Theresa Sutton as Exhibits E (ConnectU Massachusetts Action), L (PNS), M (ConnectU), N (iMarc), P (Gucwa). References to cites in these exhibits are to the Bates Number. E.g., "Ex. L at 2096" refers to the document with the Bates number PNS02096.

[3] These allegations also are borne out by the evidence in support of Facebook's Opposition to the Motion to Dismiss of Pacific Northwest Software and Winston Williams (Doc. Nos. 90, 92), which is incorporated herein by reference.

B. Defendants Interfered With Facebook's Discovery Efforts

In order to adequately respond to Defendants' Motion to Quash, Facebook sought to continue the original hearing date to allow for limited jurisdictional discovery. The Superior Court agreed. Sutton Decl., Ex. Y. On November 3, 2005, Facebook served special interrogatories and document requests on each of the five defendants, and noticed each defendants' deposition. *Id.*, Ex. Z. Notwithstanding the court's approval of this discovery, defendants indicated they would not appear for deposition but, instead, would seek a protective order. Facebook obtained an order requiring the defendants to appear for deposition on or before December 23, 2005. *Id.*, Ex. AA. ConnectU still refused to appear, forcing Facebook for a third time to obtain a court order requiring ConnectU to appear for deposition. *Id.*, Ex. BB.

At Defendants' insistence, Facebook took all five depositions in one day (January 16, 2006, which was the Martin Luther King holiday). The depositions ran from 8:45 A.M. through 10:00 P.M. Despite the limited nature and time of each of the depositions (between 1 1/2 to 3 1/2 hours, each), Defendants' counsel made upwards of 500 objections, instructions, or threats to move for sanctions that day for exceeding the scope of the deposition limitations. In ConnectU's corporate deposition, alone, counsel objected or commented 140 times over three and one-half hours. He also objected or commented 62 times during Narendra's 87 minute deposition.

Facebook also propounded a set of special interrogatories on all defendants, one of which sought the identity of ConnectU's "current and former directors, officers, employees, AND agents" without limitation to those identified in ConnectU's Operating Agreement, as well as the dates of their membership. Sutton Decl., Ex. Z (Special Interrogatory No. 14). In their initial responses, Defendants and ConnectU objected to the interrogatory without providing a substantive response. *Id.*, Ex. JJ. Facebook filed a Motion to Compel further responses. *Id.*, Ex. CC. After the court granted Facebook's motion, on February 17, 2006, Defendants declared under penalty of perjury in Amended Interrogatory Responses that the:

> Members of ConnectU include Cameron Winklevoss, Tyler

> Winklevoss, Howard Winklevoss, and Divya Narendra, as set forth in the Limited Liability Company Operating Agreement recited in the Interrogatory ("Operating Agreement") and found at bates numbers C011285 through C011335. **These persons have all been Members since ConnectU was formed**.

Id., Ex. V. (Emphasis added.) Defendants made similar statements hundreds of times in discovery, often without reference to the Operating Agreement. *Id.*, Exs. R, T, V.

However, after Defendants were dismissed from this action and Narendra had been confronted at his deposition in the Massachusetts action with a copy of his Amended Response to Special Interrogatory No. 14, ConnectU served in this case an Amendment to its own Second Amended Response:

> Because it cited to the Limited Liability Company Operating Agreement … ConnectU interpreted this Interrogatory as calling for the identification of its members from the time the Agreement was executed to the present. ConnectU continues to believe this Interrogatory is vague and ambiguous, compound and complex. If Plaintiff was seeking information regarding ConnectU's membership prior to the date this Agreement was executed, ConnectU does not understand why Plaintiff cited this Agreement in the Interrogatory because this Agreement was executed after ConnectU, LLC was created. ConnectU was created on or about April 6, 2004. If this interrogatory seeks information regarding ConnectU's membership from the time it was created, ConnectU submits the following amendment to its second amended response to this Interrogatory. From April 6, 2004 to August 5, 2005, the Members of ConnectU were Cameron Winklevoss and Tyler Winklevoss. As of August 5, 2005 and through May 23, 2006, the Members of ConnectU were Cameron Winklevoss, Tyler Winklevoss, Divya Narendra, and Howard Winklevoss. …

Id., Ex. HH. While this "amendment" was of no effect in this action, ConnectU's counsel sought to introduce it in Massachusetts *the next day* to show that Narendra was not a member at the relevant time. The Massachusetts judge rejected ConnectU's offer, and said that the amendment "doesn't supersede what Mr. Narendra's [original] answer is." *Id.*, Ex. FF at 232:16 to 233:12; *see* Sutton Decl., Ex. V.

Facebook also served each of the Defendants with Form Interrogatories. *Id.*, Ex. Z. Initially, Defendants answered under oath that any unlawful downloads of email account information by ConnectU from the Facebook website occurred only in their capacities as "members" of ConnectU. *Id.*, Ex.KK. However, because Defendants' responses were deficient, in a separate order dated March 9, 2006, the California Superior Court also compelled each of the defendants to identify in supplemental form interrogatory responses what information each of them actually had downloaded from the Facebook website. *Id.*, Ex. II. After being forced to make this disclosure, Defendants served both supplemental form interrogatory responses and filed declarations in support of their Motion to Quash, in which they indicated that all downloads referenced in their responses occurred prior to the end of July 2004. *Id.*, Ex. T; Mosko Decl., Exs V-9, V-10, V-12. Significantly, as part of this admission, Defendants also cross-referenced their amended response to Special Interrogatory No. 14, where they had indicated Narendra and the others had been members of ConnectU, LLC from its formation, in arguing that all downloads prior to July, 2004, occurred as members of the entity. Sutton Decl. Ex. T. Defendants' responses to Facebook's RFAs repeated Defendants' position that they acted only as members prior to September 2, 2004. *See, e.g., id.*, Ex. R.

Finally, Facebook also served requests for production, some of which required all documents relating to the formation of ConnectU, LLC. *Id.*, Ex. Z. Again, the Superior Court found ConnectU's initial responses deficient and ordered supplementation, including a Declaration describing that a complete production had been made. *Id.*, Ex. DD at 1-2. ConnectU did not include any Wachovia bank records or foreign LLC registrations from Connecticut in response, even though those were the principal documents that ConnectU later argued to the Massachusetts court proved Cameron and Tyler Winklevoss, but not Divya Narendra, were the members of ConnectU, LLC as of September 2, 2004. *Id.*, Ex. S at 53-54.

C. New Facts Discovered After Original Complaint Filed

Plaintiffs uncovered critical new evidence of Defendants' wrongful conduct after protracted discovery and well after the Superior Court granted Defendants' Motion to Quash on June 2, 2006. For instance, on September 26, 2006, in the Massachusetts action, Facebook first issued a subpoena *duces tecum* to Pacific Northwest Software ("PNS") seeking a variety of documents, including many that would have revealed details of Defendants' wrongdoing. *Id.*, Ex. F. PNS originally agreed to produce responsive materials, then recanted and resisted producing any information while moving to quash the subpoena. *Id.*, Exs. G-I. PNS was largely successful and, as a result, produced approximately 25 pages of documentation on December 21, 2006.

On December 28, 2006, Facebook subpoenaed PNS in this action. *Id.*, Ex. J. PNS agreed to appear for deposition and produce responsive documents. PNS produced documents on January 26, 2007, which confirmed that Defendants were intricately involved in efforts to hack into Facebook's servers, steal data, and spam Facebook users. *Id.*, Ex. L at 15-16, 1238-39, 1767-69, 571135-38. PNS documents also showed that Cameron and Tyler were directing and paying for the development work. SAC ¶¶ 26, 28-34; Sutton Decl., Ex. L at 571135-38.

Meanwhile, on September 26, 2006, third party iMarc LLC produced its own documents showing that 1) Defendants had sought iMarc's assistance to develop the importer program to hack into Plaintiffs' servers and steal data, 2) that Defendants spammed possibly millions of Facebook users and 3) that Narendra had at least one friend helping mine the Facebook servers for email addresses. SAC ¶¶ 26, 27; Sutton Decl., Ex. N.

On March 12, 2007, defendant Gucwa, who helped develop the importer program, produced documents that show that defendant Chang had partnered with Cameron and Tyler in the importer and Social Butterfly endeavor, and was taking direction and assistance from them on the project. SAC ¶¶ 22, 28-30; Sutton Decl., Ex. P.

Finally, Plaintiffs also recently learned that in 2005 Narendra provided Williams with Facebook account information to enable him to access Plaintiffs' website and steal data. Sutton Decl., Ex. O at 102:7-103:1.

D. The Second Amended Complaint

After ConnectU removed this case on March 9, 2007, PNS and Williams moved to dismiss on the ground that the Court could not exercise personal jurisdiction over them. Doc. Nos. 1, 23. While that motion was pending, Facebook filed a Second Amended Complaint ("SAC") based on all of the new critical discovery it had uncovered. Doc. No. 76. The SAC named Mark Zuckerberg as an additional plaintiff, added two new defendants (Chang and Gucwa) and renamed Defendants. *Id.*

The SAC also contains dozens of new allegations related to personal jurisdiction and Defendants' contacts, including:

> • Mark Zuckerberg is a former Harvard student who, in June 2004, took a leave of absence from school to come to California.

SAC ¶ 13.

> • At different times from the winter or spring of 2004 through at least 2005, Defendants Cameron and Tyler Winklevoss, Divya Narendra … knowingly circumvented the Terms of Use for the Facebook website by illicitly employing the user IDs and passwords of friends who were registered members of the Facebook website to mask Defendants' real identities.

Id. ¶ 22; Sutton Decl., Exs. E at 10359; N at 659.

> • Despite iMarc's caution against [writing a script to log into the Facebook website and grab people's email addresses], on July 22, 2004, "the boyz from" ConnectU "sent thousands of invite emails [over a 12 hour period]. Every single one was sent using a bogus 'From' address… ."

SAC ¶ 27; Sutton Decl., Ex. N at 622-4 and 798.

> • Messrs. Winklevoss engaged Wayne Chang, PNS and Winston Williams to develop a computer program designed to retrieve user account names, personal data (including email addresses and personal data of such user's "friends") from Facebook and its servers located in California. Mr. Chang and Mr. Gucwa, with the knowledge and support of ConnectU, Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra, collaborated with PNS and Mr. Williams to achieve the goal of writing programs to retrieve email account information and other data from the Facebook website and its servers in California.

SAC ¶ 28.

> • In late 2004, Messrs. Winklevoss and Narendra hired defendants PNS and Williams to help develop the connectu.com website. PNS/Mr. Williams joined forces with Messrs. Chang and Gucwa to develop the importer/crawler" program, as well as the Social Butterfly program. All Defendants knew the "importer/crawler" and Social Butterfly programs would be used to spam and solicit California-based and other users of the Facebook website to invite them to join the ConnectU website.

SAC ¶ 33; Sutton Decl., Exs. Q; L at 842-843, 1236, 1341, 1238, 02096, 15, 1134-49; M at 172, 2972; P at 4, 71-72, 90.

> • Defendants sought commercial gain and competitive advantage through their unauthorized access as explained, in May 2004, by Cameron Winklevoss to his father, when he described how he and

> his colleagues would steal course information and other data from www.facebook.com in order to launch connectu.com with as many or more schools than Facebook. Defendant Cameron Winklevoss explained to his father … that such theft would give them a competitive advantage over Plaintiffs without investing the time it took Plaintiffs to become successful.

SAC ¶ 38; Sutton Decl., Ex. E at 3865-69; *see also* SAC ¶¶ 24-38.

After Plaintiffs filed the SAC, ConnectU moved to strike the new pleading and sought an extension of time to respond on behalf of the other defendants. Doc. No. 78. The Court granted an extension of time for all newly named defendants to respond until 20 days after the Court's ruling on PNS and Williams' Motion to Dismiss. Doc. No. 84. In doing so, the Court noted that "it seems likely that at least some of the conclusions the Court reaches as to Pacific Northwest and Winston Williams will be instructive in the context of evaluating any other motions to dismiss for lack of jurisdiction." *Id.* at 2. The Court denied PNS and Williams' Motion on August 13, 2007. Doc. No. 124.

PNS, Williams, Chang, and Gucwa answered the SAC on September 5 and 7, 2007. Doc. Nos. 141-143, 146. Defendants filed the present Motion to Dismiss. Doc. No. 136.

III. LEGAL ARGUMENT

Defendants' primary argument is that the previous order quashing service operates as an equitable preclusion. Defendants' position is wrong.

A. Evaluation Of Personal Jurisdiction By This Court Is Proper Where New Jurisdictional Facts Are Pled

Defendants incorrectly argue that a "bright line" direct estoppel rule exists. Ninth Circuit and California law recognize that courts do not blindly apply direct estoppel; instead, even in cases where the litigation is between the same parties and based on the same cause of action, "the trial court is to compare the pleadings and judgment and determine whether the plaintiff has pleaded any new facts that would support a different result on the issue of jurisdiction."[4] *In Re*

[4] Defendants contend that because Facebook did not appeal or move for reconsideration it should be precluded from raising the jurisdictional issue again. Mot. to Dismiss at 6. A motion for reconsideration must be filed within 10 days after service of notice of entry of the order and is only permitted when it is "based on new or different facts, circumstances, or law." Cal. Code Civ. Proc. § 1008. Section 1008 is a State Court procedural rule that was no longer effective after

Northwest Pipe & Casing Co, 67 B.R. 639, 641-642 (Bankr. D. Or. 1986); *see also Kendall v. Overseas Dev. Corp*., 700 F.2d 536 (9th Cir. 1983). Indeed, the "dispositive question is whether [plaintiff] pleaded any new facts in the federal litigation that would support a different result on the issue of jurisdiction." *Kendall*, 700 F.2d at 539; *see also Lucido v. Super. Ct*., 51 Cal.3d 335, 342 (1990) ("The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same."); *see also Carter v. Koh*, 2003 WL 21760109, *3 (Cal. App. 5th Dist.) (unpublished) (citing *GMS Properties, Inc. v. Super. Ct.,* 219 Cal. App. 2d 407, 410 (1963)); *Renteria v. Oyarzun*, 2005 WL 588401, *1 (N.D. Cal) (citing *Kendall*, 700 F.2d at 538); *Young v. Actions Semi*, 2007 WL 2177028, *6 (S.D. Cal.) (citing *Kendall*, 700 F.2d at 539).

The cases relied upon by Defendants confirm that the Court should compare the allegations of the two complaints. *Sabek v. Engelhard Corp*., 65 Cal. App. 4th 992, 996 (1998) (where trial court asked "what changed about minimum contacts that would support a different ruling in this proceeding?"); *MIB v. Super. Ct*., 106 Cal. App. 3d 228, 235 (1980) (where court found res judicata applicable because the "causes of action alleged in the current complaint arise out of the same course of conduct as that complained of in the first three complaints"); *Valdez v. Kreso*, 144 F.Supp.2d 663 (ND Tex. 2001) (where plaintiff filed a new action "on the basis of the same facts" as the earlier, dismissed action)[5]; *Deckert v. Wachovia*, 963 F.2d 816 (5th Cir. 1992)

ConnectU removed this case to Federal Court. At best, Fed.R.Civ.P. 59(e) applies in this Court. To the extent it is necessary, Facebook requests reconsideration in the interests of justice, since under Fed.R.Civ.P. 54(b) the judgment has not been certified as final. Defendants also contend that Facebook was required to appeal within 60 days of a notice of entry of order, which would have been August 1, 2006. Cal. Rules of Court 8.104(a). The factual predicate for jurisdiction in the SAC was unknown to Plaintiffs until long after the time for appealing or moving had passed. Moreover, there is a split of authority in California whether the Order of Dismissal even triggered the deadline. *See infra* note 6.

[5] Defendants' cite to *Valdez* solely to encourage the Court to sanction Plaintiffs for renaming Defendants. Aside from being a wholly improper vehicle for seeking sanctions, Defendants mischaracterize why the *Valdez* court sanctioned the attorney. In that case, the plaintiff's attorney included false allegations in the complaint, and had filed the complaint without the plaintiff's knowledge or approval. Importantly, the attorney in *Valdez* had been sanctioned by the same court in a previous action, and the court had hoped that sanction would have been a reminder of the attorney's Rule 11 obligations. Based on his subsequent behavior in the *Valdez* case, including knowing "for certain … that his personal jurisdiction contention was meritless," the court found that he had not been dissuaded from his unethical behavior. The court did not sanction the attorney for having sought to relitigate the jurisdictional issue. As this Court's dismissal of the earlier motion to dismiss by other defendants shows, Plaintiffs' jurisdictional

(where court found that "the allegations in Deckert's federal complaint – with the exception of one additional claim for breach of contract – arise out of the same set of facts forming the basis of the state court lawsuit and are the same as the allegations in Deckert's state court petition.").

The new allegations and exhibits demonstrate that Defendants were aware of – indeed commissioned – the activity, managed the work, and paid for it. Sutton Decl., Exs. E, L, M, P; SAC ¶¶ 24-38. As can be seen from a comparison of the original complaint in this action with the Second Amended Complaint, Plaintiffs have alleged a significant number of new facts and added new claims for relief based on those new facts. Sutton Decl., Ex. Q. All of the new factual allegations give rise to the exercise of jurisdiction over Defendants.

The SAC includes new jurisdictional facts establishing Defendants' wrongful conduct after Facebook was in California. Plaintiffs allege in the SAC that, in fact, Zuckerberg was in California by June 2004. SAC ¶13. In addition, contrary to their representations in a reply brief, the record demonstrates that Defendants were, indeed, deeply engaged in wrongful conduct well into 2005. SAC ¶¶ 28-35; Sutton Decl., Exs. E, L, M, P.

Plaintiffs also amended the complaint to include factual allegations demonstrating that Defendants were engaged in the transmission of spam email to California residents. SAC ¶¶ 26, 27, 30, 33, 34, 36; Sutton Decl., Ex. M at 2972. Violations of the CAN-SPAM Act, including Defendants' transmission of unsolicited commercial email through the use of false and misleading header information, were not alleged in the original complaint but were added to the SAC. SAC ¶¶ 26, 27, 30, 33, 34, 36; Sutton Decl., Ex. M at 2972. These allegations, the facts in support of which were unknown to Plaintiffs until March 2007, alone would permit this Court to exercise jurisdiction over these defendants. *GMS Properties, Inc. v. Super. Ct.*, 219 Cal. App. 2d 407, 410 (1963) ("through additional allegations in the second amended complaint the situation was changed so that there then was an adequate pleading authorizing service through the secretary of state to give the California court personal jurisdiction of petitioner.").[6]

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allegations are not meritless and, as a result, *Valdez* is inapposite.

[6] Some courts disagree with *GMS Properties*. There appears to be two lines of cases in California. *GMS Properties* and its followers suggest that the granting of a motion to quash for lack of jurisdiction is akin to the granting of a demurrer with leave to amend, and the plaintiff is therefore afforded the opportunity to amend the complaint to cure the jurisdictional defects. *Santa*

The SAC contains many factual differences from the original complaint, virtually all of which would separately support this Court's exercise of personal jurisdiction over Defendants. Most telling of their significance is this Court's August 13, 2007, Order in which it denied PNS and Williams' Motion to Dismiss the same complaint Defendants challenge here. Doc. No. 124. The allegations in the SAC, and the evidence proffered in opposition to PNS and Williams' Motion to Dismiss (Doc. Nos. 90, 92) provide substantial reason to revisit the issue of jurisdiction over Defendants in California.

B. A Party May Not Invoke Direct Estoppel When It Procured The Previous Result Through Its Own Misconduct

Direct estoppel also is inapplicable because the prior dismissal was improperly procured. Where, as here, a party is prevented from fully and fairly litigating an issue because of its adversary's misconduct, the harmed party will not be precluded from raising the issue again. Restatement (Second) of Judgments (2007), § 28(5), Rptr's notes ("Subsection (5) represents an effort to distill from case and commentary those situations in which competing policy considerations outweigh the policy factors underlying direct and collateral estoppel. … [t]he basic principles should be sufficiently flexible to accommodate them when a clear need for a redetermination of an issue has been established"); *see also Danner v. Dillard Dep't Stores*, 1997 Okla. 144 (1997) (where court did not apply collateral estoppel because, among other reasons, opponent raised key facts that were not and could not have been discovered before the preliminary hearing).

The policies underlying application of collateral estoppel also dictate against its use here. Collateral estoppel (and related doctrines) are designed to protect the integrity of the judicial

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Clara VTA v. Amalgamated Transit Union, 2002 WL 1060848; *Carter v. Koh,* 2003 WL 21760109; *Nichols v. Canoga Industries, Inc.*, 83 Cal. App. 3d 956 (1978). Following this line of cases, the Court may reconsider a state court's interlocutory orders. 16 *Moore's Federal Practice*, § 107.31[3] citing *Fairbank v. Wunderman Cato Johnson,* 212 F.3d 528, 531 (9th Cir. 2000). The other cases disagree with this analysis and find that dismissal based on lack of jurisdiction is a final, appealable result. *Sabek, Inc. v. Engelhard Corp.*, 65 Cal. App. 4th 992 (1998); *A.M.T. Gas & Oil American, Inc. v. Treuteam GMBH*, 2004 WL 2165647. Despite the split analysis, one thing is consistent among all of these cases, which renders the split irrelevant – courts review the subsequent pleadings to determine if the plaintiff alleged any new facts to change the jurisdictional analysis.

system, promote judicial economy, and protect litigants from harassment through vexatious litigation. *Lucido*, 51 Cal.3d at 343. None of these considerations would be served here by denying the addition of Defendants to this lawsuit. They should not be immune from jurisdiction, where the evidence conclusively shows that they deliberately misled various courts and Plaintiffs. As reflected by the events leading to the Massachusetts court's decision that none of the Defendants was a member of ConnectU, LLC prior to August 5, 2005, Defendants took every available opportunity to exploit the judicial system, by making false sworn statements and interfering with Facebook's discovery efforts.

In order to salvage ConnectU's lawsuit against Facebook and others in Massachusetts, Defendants executed an Operating Agreement purporting to govern ConnectU, LLC's affairs. Sutton Decl., Ex. U. The Agreement was signed on August 5, 2005, 16 months after ConnectU was organized, and only after Facebook questioned whether ConnectU had standing to bring the Massachusetts action against Facebook. The Agreement purported to make Defendants' membership in ConnectU retroactive to April 6, 2004.[7] Facebook then filed the present lawsuit, in response to which Defendants filed their Motion to Quash. Mosko Decl., Ex. V-2 (Doc. No. 137-7). In arguing that they could not be held liable for their actions because they acted only as members of ConnectU, Defendants submitted declarations in support of their motion taking the same position. *Id*. Ex. V-3 (Doc. No. 137-8). Defendants' discovery responses also indicated that all three of them were members of ConnectU from the day it was formed (*i.e*., April 6, 2004). Sutton Decl., Ex. V.

Ten days after they were dismissed from this action, however, Defendants submitted declarations in the Massachusetts action indicating for the first time that Narendra was not made a member of ConnectU "until well after September 2, 2004." *Id*., Ex. W. At the same time, ConnectU argued that the purported "oral agreement" in place from ConnectU's April 2004 organization to August 5, 2005, along with its business records at that time, were definitive for

[7] Whether Delaware law permits someone to retroactively make himself a member in a limited liability company is irrelevant to whether, at the time Defendants engaged in the acts complained of in this matter, they believed they were members of the business entity. The record shows they did not even discuss membership until long after the acts giving rise to this litigation occurred. Sutton Decl., Ex. S at 51.

that time period as to who was a member of ConnectU; whereas the written Operating Agreement was definitive on this issue beginning on August 5, 2005. *Id.*, Ex. X at 7. Despite ConnectU's arguments, Narendra testified under oath that he would return to California and again take the position he was a member of ConnectU on April 6, 2004. *Id.*, Ex. A at 76:2-8. With the filing of the present motion, which incorporates Defendants' Motion to Quash, Narendra has done exactly as promised and has come to this Court to again say any actions he took were in his capacity as a member of ConnectU, LLC. Mot. to Dismiss, Doc. No. 136, at 7; and Mosko Decl., Ex. V-3. The District of Massachusetts found, after reviewing the evidence and the law, that this assertion was incorrect. Sutton Decl., Ex. S at 51, 55.

In addition to using membership as a both a shield and a sword, Defendants falsely argued that none of the activities in which they engaged to harm Facebook occurred after July 2004. *Id.*, Ex. C. As the SAC demonstrates, Defendants were intimately involved in activities designed to harm Plaintiffs well into 2005. SAC ¶¶ 29-34; see also Sutton Decl., Exs. L, M, P, E at 4243, 6535, 6537, 8657, 10359. Defendants appear to have drawn a distinction between their having logged into Facebook using borrowed and fake accounts to copy and paste email addresses and using an automated importer system. Sutton Decl., Ex. C. Defendants went so far as to argue that "ConnectU created a screen on its site" that generated "invitations" from ConnectU users after they entered their account information. *Id.* at 4. In fact, Defendants developed an entire series of computer scripts specifically designed to target the Facebook website, breach its security mechanisms, steal user data, and spam Facebook users. SAC ¶¶ 29-34; Sutton Decl., Exs. L, M, P, E at 4243, 6535, 6537, 8657, 10359; *see also* Facebook's Opp'n to Mot. to Dismiss (Doc. No. 91). ConnectU further argued that this "automatic" process "was not personally done by Defendants" and they "did not personally participate in this activity." Sutton Decl., Ex. C at 4. This is another reference to their argument that they acted as members of ConnectU, which must be rejected. As detailed in the SAC, these arguments are false. Both importer and Social Butterfly were paid for, developed, implemented, and maintained at Defendants' instruction. *Id.* Exs. E at 11073; L at 571135-38, 1759-1777; SAC ¶¶ 27-29, 33. Defendants advanced these arguments – despite their falsity – to escape jurisdiction in California. They should not be permitted to do so again.

Defendants' misconduct also permeated discovery in this case. After Defendants filed their Motion to Quash, Facebook obtained court approval to serve narrowly tailored jurisdictional discovery. Sutton Decl., Ex. Y. Defendants interfered with Facebook's efforts to learn the extent of their activities vis-a-vis Plaintiffs' servers, forcing Facebook repeatedly to seek the court's assistance in obtaining authorized depositions. *Id.*, Exs. AA, BB, CC, DD. Further, even when Defendants succumbed to discovery, they thwarted Facebook's efforts, by repeatedly interrupting depositions with improper objections and threats. *See* Section II.1.B, *supra*.

Defendants' responses to written discovery were equally obstructive and admittedly misleading. Defendants were initially unresponsive to written discovery (raising objections without any substantive answers), again forcing Facebook to seek court intervention. Sutton Decl., Ex. CC, GG. As a result, the full import of Defendants' wrongdoing was not realized until PNS and Gucwa produced documents earlier this year. The information gleaned from those materials was incorporated into the SAC and is described more fully in Facebook's opposition to PNS and Williams' Motion to Dismiss. Doc. Nos. 76, 136.

Had Defendants not gone through extraordinary efforts to prevent Facebook from learning the true extent of their involvement in the complained of activity, including manufacturing membership and interfering with discovery, Plaintiffs are certain that the Superior Court would have denied their Motion to Quash – just as this Court denied PNS and Williams' Motion to Dismiss.

C. This Court Previously Rejected Defendants' Arguments When It Denied Pacific Northwest Software And Williams' Motion To Dismiss

Defendants do not raise any arguments in their Motion to Dismiss that differ from the jurisdictional arguments raised by PNS and Williams (and rejected by this Court), despite the addition of substantial new allegations. Instead, they incorporate by reference their earlier Motion to Quash filed in the Superior Court. Mot. to Dismiss (Doc. No. 136) at 7. In the Motion to Quash, Defendants argued that whatever activity they engaged in, they did as "members" of ConnectU, LLC and, therefore, are somehow shielded from liability. Mosko Decl., Ex. V-2 (137-

7) at 1-2. Defendants also argued (on reply) that none of their activity occurred after July 2004.

Like Defendants, PNS and Williams argued they should be shielded from liability because they were acting in an "official," "corporate" capacity, and this Court rejected that argument when it denied their Motion to Dismiss. Doc. No. 124; *see also Keeton v. Hustler Magazine*, 465 U.S. 770, 781 n.13 (1984); *Calder v. Jones*, 465 U.S. 783, 790 (1984); *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 521 (9th Cir. 1989). Furthermore, Defendants, themselves, should be precluded from raising this argument here. The District of Massachusetts recently dismissed ConnectU's complaint against Facebook and Zuckerberg because it found that none of the Defendants was a member of ConnectU until August 5, 2005. Sutton Decl., Ex. S at 36, 55. If principles of collateral estoppel should apply anywhere, it is with respect to Defendants' raising this argument again. In addition, Defendants' "membership" issue also should be rejected because, where there has been a change in conditions since the former ruling, res judicata principles do not apply. Restatement (Second)of Judgments (2007), §751; *State Farm Mut. Auto Ins. Co. v. Duel*, 324 U.S. 154 rehr'g denied 324 U.S. 887 ("… res judicata is no defense where, between the time of the first judgment and the second, there has been an intervening decision or a change in the law creating an altered situation.").

Further, Defendants' argument that none of their hacking occurred while Plaintiffs were in California is demonstrably false. Sutton Decl., Ex. C at 4. The record shows that Mark Zuckerberg was in California as early as June 2004, and that a significant amount of illegal activity occurred well into 2005. SAC ¶¶ 13, 26-38. In fact, the importer program was not developed and implemented until 2005. *Id.* ¶ 30. Defendants sought to minimize the impact of the importer in their earlier briefing by suggesting that the fact that it was an "automated" process somehow absolved them of liability. Sutton Decl., Ex. C at 4. The allegations in the SAC refute such a suggestion, and the Court agreed when it denied PNS and Williams' motion to dismiss. For the same reasons the Court denied PNS and Williams' Motion to Dismiss, it must dismiss the present motion.

IV. CONCLUSION

Defendants' Motion to Dismiss must be denied. As discussed above, the prior ruling in the Superior Court was obtained through a series of deliberate misrepresentations of fact and repeated, obstructive behavior in the discovery process. Further, in light of the findings of the Massachusetts District Judge, Defendants should be barred from asserting they are immune from liability. The Court recently found that out-of-state defendants Pacific Northwest Software and Winston Williams were subject to jurisdiction in California, based on the same factual allegations. Defendants should not be permitted to hide behind equitable doctrines such as direct estoppel and issue preclusion, in light of the facts and circumstances of this case.

Dated: September 19, 2007 ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Theresa A. Sutton /s/

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on September 19, 2007.

Dated: September 19, 2007.

Respectfully submitted,

/s/ Theresa A. Sutton /s/
Theresa A. Sutton